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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. KEVIN McGOWAN, Defendant and Appellant.	B277462 (Los Angeles County Super. Ct. No. TA122685)

APPEAL from a judgment of the Superior Court of Los Angeles County. Patrick Connolly, Judge. Affirmed.

Sally Patrone Brajevich, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Ilana Herscovitz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

On May 6, 2016, the trial court, after a two-day evidentiary hearing, denied appellant's motion to dismiss the charges against him for violation of his speedy trial rights. On June 20, 2016, while awaiting a jury panel to begin jury selection in front of a different court, appellant pleaded no contest to three counts of attempted murder and various gun enhancements for an agreed-upon disposition of 34 years, 8 months. At his sentencing on August 30, 2016, appellant unsuccessfully sought to relieve his court-appointed counsel and, for the first time, indicated he wanted to appeal the adverse ruling on his speedy trial motion. The prosecutor did not formally object and the trial court, before it sentenced appellant, indicated it would sign the required certificate of probable cause.[1] Appellant challenges the denial of his speedy trial motion in this appeal.

We do not reach the merits of the denial of appellant's speedy trial motion because he is procedurally barred from raising this issue on appeal. The law is clear under Penal Code section 1237.5 that speedy trial challenges, for purposes of appeal, do not survive a no contest or guilty plea.[2] Additionally, unlike the cases cited by appellant in his briefs before this court, the right to appeal the denial of the motion was never a condition of his acceptance of the prosecutor's plea offer; indeed, it was

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[1] Although the sentence agreed upon during the plea was 34 years, 8 months, at sentencing the prosecution, for reasons not explained, agreed to a two-year reduction and did not object to a sentence of 32 years, 8 months.

[2] All further statutory references, unless otherwise noted, are to the Penal Code.

never even mentioned until over two months after he entered his plea, when he returned to court for sentencing.

PROCEDURAL HISTORY

It is the procedural history, rather than the specific facts underlying the substantive charges in this case, that is germane to the issues raised by this appeal.

On April 6, 2012, the district attorney filed a felony complaint for arrest warrant charging appellant with three counts of willful, deliberate, and premeditated attempted murder and firearms enhancements pursuant to section 12022.53, subdivisions (b), (c), and (d). On August 6, 2015, Long Beach police officers arrested appellant in connection with an unrelated investigation. Eventually appellant was identified and arraigned on the felony complaint on August 11, 2015.

Appellant was held to answer after a preliminary hearing and the district attorney filed an information charging him with three counts of willful, deliberate, and premeditated attempted murder with firearm enhancements pursuant to section 12022.53, subdivisions (b), (c), and (d). On May 6, 2016, after a two-day evidentiary hearing, the calendar court denied appellant's motion to dismiss for violation of his speedy trial rights. On June 20, 2016, the master calendar court transferred appellant's case to a trial court to begin jury selection. With a jury panel waiting, and with the permission of defense counsel, the trial court spent an extensive amount of time discussing with appellant his maximum exposure if he went to trial and lost (three consecutive life terms for the substantive charges alone) versus the possibility of a determinate term if offered by the prosecutor.

After this colloquy, and after further consultation with his attorney, appellant elected to accept a determinate offer of 34 years, 8 months made by the trial prosecutor. The trial court took the plea and waivers, and found the plea to be knowing, intelligent, and voluntary, with full knowledge of the consequences. At no point, either during the colloquy with the court about exposure or the taking of the plea, did the court, any party, or attorney mention the possibility of appealing the earlier denial of the speedy trial motion.

When appellant returned to court on August 30, 2016 for sentencing, he advised the court that he wanted to withdraw his plea and relieve his appointed counsel. After the court denied the request to relieve counsel and after counsel stated he did not believe that there was a good faith basis to withdraw the plea, appellant, through counsel, raised for the first time that he wanted to appeal the denial of his speedy trial motion. Prior to the court imposing sentence, the prosecutor did not formally object to an appeal and the trial court agreed to sign a certificate of probable cause. After sentencing, the trial court signed the certificate of probable cause and appellant filed his notice of appeal.

DISCUSSION

1. Appellant is Procedurally Barred from Appealing the Denial of his Speedy Trial Motion

Section 1237.5 limits appeals from convictions based upon pleas of guilty or no contest to those where the defendant has obtained a certificate of probable cause *and* the defendant's sworn written statement shows "reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings."

The claim of a speedy trial violation, whether statutory or constitutional, does not survive a guilty plea under section 1237.5. (*People v. Hernandez* (1992) 6 Cal.App.4th 1355, 1357 (*Hernandez*); *People v. Stittsworth* (1990) 218 Cal.App.3d 837, 839-840; *People v. Draughon* (1980) 105 Cal.App.3d 471, 473-474; *People v. Lee* (1980) 100 Cal.App.3d 715, 717-718 (*Lee*); *People v. Hayton* (1979) 95 Cal.App.3d 413, 418-419.)[3] The rationale for this rule is that a speedy trial claim contends that the passage of time has prejudiced the defendant's ability to establish his innocence. But since his plea admits every element of the offense, there are no facts to be assessed and no innocence to be established. (*Lee,* at p. 717.) Appellant's speedy trial claim is therefore not cognizable on appeal.

Appellant's reliance on the court's execution of a certificate of probable cause and the prosecutor's failure to object to the appeal do not help him. Section 1237.5 is jurisdictional, and " '[o]btaining a certificate of probable cause does not make cognizable those issues which have been waived by a plea of guilty.' " (*Hernandez, supra,* 6 Cal.App.4th at p. 1361 [quoting *People v. Kaanehe* (1977) 19 Cal.3d 1, 9]; *Lee, supra,* 100 Cal.App.3d at p. 717.) Moreover, since the issue is one of our statutory jurisdiction, the prosecutor's failure to object does not

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[3] Appellant's implied contention that his "no contest" plea should be treated differently than a guilty plea for purposes of this appeal is without merit. First, section 1237.5 limits appeals from both guilty pleas and no contest ("nolo contendre") pleas equally. Second, a no contest plea to a felony has the same legal effect as a guilty plea "for all purposes." (§ 1016, subd. (3).) There is therefore, no basis to differentiate between a guilty and no contest plea for purposes of defining cognizable issues on appeal under section 1237.5.

waive the issue. (Cf. *Hernandez,* at p. 1361 ["Even if we were to read the record as containing some sort of agreement by the trial court that defendant could appeal the denial of the two motions, we would not be bound by such an agreement, but would remain subject to the statutory limitations imposed by the Legislature and encompassed by section 1237.5"].)

2. The Right of Appeal Was Not Part of the Plea Agreement

Appellant cites two cases, *People v. Glover* (1974) 40 Cal.App.3d 1006, 1010-1011 (*Glover*), and *People v. Bradley* (1984) 159 Cal.App.3d 399, 403 (*Bradley*), in support of a contention that he should be permitted to appeal the denial of his speedy trial motion, notwithstanding section 1237.5 and the authority cited above, because appeal of the motion was part of the plea agreement and he is entitled to the "benefit of the plea bargain." Neither case is applicable to the facts before us.

In *Glover*, the Court of Appeal determined that a material condition of the plea agreement was the trial court's promise to the defendant that he would be able to appeal the adverse ruling on his speedy trial motion. (*Glover, supra,* 40 Cal.App.3d at p. 1010.) In order to give the defendant "the benefit of his bargain," the court reviewed the merits of his speedy trial issue notwithstanding the prohibition of section 1237.5. (*Id.* at p. 1011.)

In *Bradley,* the same scenario occurred: the trial court erroneously promised the defendant, during his plea, that he would be able to raise his speedy trial claim on an appeal from his guilty plea. (*Bradley, supra,* 159 Cal.App.3d at p. 403.) The Court of Appeal recognized that the issue was not cognizable on

appeal, and so remanded the case to enable the defendant to withdraw his guilty plea. (*Ibid.*)

Appellant's contention that he is similarly situated factually is not an accurate representation of the record below. On May 6, 2016, after a two-day evidentiary hearing, the calendar court judge below, Judge Walton, denied appellant's speedy trial motion. Nearly 45 days later, on June 20, 2016, the master calendar court transferred the case to a trial court, Judge Connolly, to begin jury selection. As described earlier, prior to jury selection, Judge Connolly, with the permission of defense counsel, engaged defendant in a lengthy discussion of his exposure and his options in place of a trial. Thereafter, the trial prosecutor apparently made a 34 year, 8 month offer, which appellant accepted by way of a no contest plea. At no point during the trial court's colloquy with appellant, the discussion of the offer, or the taking of the plea did appellant, or anyone else present for that matter, even mention the speedy trial motion, let alone condition acceptance of the determinate offer upon a right to appeal the motion's earlier denial. The issue never came up in any way, shape, or form. There is simply no basis to conclude, on the record before us, that the promise of an appeal of the speedy trial issue in any way contributed to appellant's decision to accept the prosecutor's plea offer. To the extent appellant's brief suggests otherwise, it is not an accurate description of the record.

As mentioned earlier, the issue of an appeal only came up two months later when, prior to sentencing, appellant attempted to relieve his attorney and withdraw his plea. Thus, this is not the same or even a similar situation to *Glover* or *Bradley*. Based upon the record before us, an appeal of the speedy trial motion had absolutely nothing to do with appellant's decision to take the

offer; appellant's contention otherwise is, at best, an example of "buyer's remorse" and an after-the-fact justification in an attempt to evade the deal he agreed to two months earlier. More importantly, the trial court's promise of a certificate of probable cause and the prosecutor's lack of objection do not change that fact. This is not a situation where a party fails to preserve an issue on appeal; this is an issue involving this court's statutory jurisdiction (or lack thereof) to hear this appeal. Neither affirmative action by the trial court nor inaction by the prosecutor, occurring as both did *after* appellant made his decision to enter a plea, can confer upon us jurisdiction which, statutorily, we do not have.

3. Correction of the Abstract of Judgment

When appellant entered his no contest pleas, he admitted a section 12022.53, subdivision (c) allegation as to both counts 1 and 3, and a section 12022.53, subdivision (b) allegation as to count two. The trial court sentenced appellant to the mid-term of seven years on count 3, plus 20 years for the section 12022.53, subdivision (c) allegation, plus a consecutive one-third the mid-term of 7 years (28 months) on count 2, plus a consecutive one-third of the 10-year term (40 months) for the section 12022.53, subdivision (b) allegation, for a total state prison term of 32 years, 8 months on counts 3 and 2. Further, the trial court sentenced appellant to a concurrent mid-term of seven years on count 1, and struck, for purposes of sentencing, the section 12022.53 allegation in connection with count 1. In doing so, the trial court mistakenly characterized that allegation as a subdivision (b), rather than the subdivision (c) allegation appellant actually admitted.

The abstract of judgment continues the error by incorrectly describing the enhancement in connection with count 1 as a section 12022.53, subdivision (b), rather than subdivision (c), enhancement. It also describes the punishment as "PS" which means "punishment struck."

Appellant contends that the court struck the enhancement in its entirety as to count 1 and that the abstract of judgment should be corrected to show no enhancement of any kind as to count 1. Respondent contends that that abstract should be corrected to reflect a subdivision (c) enhancement in connection with count 1, and that the notation "PS" should remain since that is a correct characterization of what occurred.

Section 1385, subdivision (c)(1), gives the court authority to strike the punishment for an enhancement whenever it has the authority to strike the enhancement itself. Based upon our review of the record, that is what we construe the trial court did when it struck the section 12022.53 allegation, incorrectly described as a subdivision (b) enhancement, for purposes of sentencing. The case is therefore remanded to the trial court to amend the abstract to show the correct enhancement in connection with count 1. The "PS," for punishment struck, should remain since that is the correct characterization of what occurred.

DISPOSITION

The judgment is affirmed. The case is remanded to correct the abstract of judgment consistent with this opinion.

SORTINO, J.*

WE CONCUR:

RUBIN, ACTING P. J.

GRIMES, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.